IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 110 OF 2007
IN
SUIT NO. 34 OF 1989
IN
PETITION NO. 155 OF 1989

Rev. Fr. Rodney Esperance ... PETITIONER

- Vs.-

Mrs.Cherylanner D'Souza
& others ... RESPONDENTS

And

Mrs.Gloria Immaculate D'Sylva. ... APPLICANT

T.P.Sen i/b. M/s.Federal & Rashmikant
for the applicant.

Denzil D'Mello for defendant No.1.

A.M.Vernekar for defendant Nos. 2 & 3.

CORAM : V.C.DAGA, J.

DATED : 19th December 2007.

P.C. :

. By this chamber summons, the applicant seeks leave of this Court to convert the above petition for issuance of probate into one for issuance of letters of administration with the Will annexed thereto and for leave to prosecute the same in place and stead of the original

petitioner/plaintiff.

The Factual Matrix :

2. The factual matrix reveals that the above testamentary petition was filed by one Rev.Fr. Rodney Esperance as a petitioner in his capacity as a sole executor named in the Will of the deceased late Mrs.Anna Esabel Pereria. Upon service of the citations in the Testamentary Petition No.155 of 1989, the same was objected to by the defendants by filing caveat under Section 284 of the Indian Succession Act, 1925 ("Act" for short) supported by an affidavit setting out therein the grounds of objections to the grant of probate in favour of the petitioner/sole executor. Upon filing of such caveat as the probate proceedings became contentious, consequently, as per the provision of Section 295 of the Act, the same was numbered as Testamentary Suit No.34 of 1989. Filing of the caveat to oppose the grant of probate or letter of administration is governed by rules 401, 402 and 403 of the Bombay High Court (Original Side) Rules, 1980.

3. It is an admitted fact that during the pendency of the above proceedings, petitioner was the sole executor of the Will of late Mrs.Anna Esabel Pereira who died at Mumbai on 23/9/2007.

Pursuant to this, the above Chamber Summons has been taken out by the applicant for; (1) substituting herself as a petitioner/plaintiff in the place of the original petitioner/plaintiff, who expired at Mumbai on 23/9/2007; and (2) to convert the suit/petition from one for probate to one for grant of letter of administration with the last will and testament dated 26/9/1985 of late Mrs. Anna Esabel Pereira annexed thereto.

4. In the affidavit in support of the Chamber Summons, the applicant has contended that, as a sole legatee and beneficiary under the Will dated 26/9/1985 of late Anna Esabel Pereira, upon the death of the sole executor, who was the petitioner in the above proceeding, the cause of action therein being continuous one survives in favour of the applicant. In other words, it is sought to be suggested by the applicant that the right of an executor to apply for probate was a right to sue and that when the sole executor dies during pendency of the application for probate, the right to sue survives. It is on the basis of this submission that the present chamber summons has been taken out by the applicant for substitution of her

name in the place of the deceased sole executor-petitioner/ plaintiff with a prayer to allow her to continue the proceedings by converting the petition/suit into one for grant of letter of administration with the Will annexed.

5. The Chamber Summons taken out by the applicant is strongly opposed by the defendants contending that it is totally misconceived and not maintainable inasmuch as upon the death of the sole executor viz. the petitioner/plaintiff, who had applied for probate, the proceedings abate and the right to sue does not survive. Hence, neither the applicant can be substituted in the proceedings in the place of the deceased sole executor nor the proceedings can be converted from probate proceedings to one for letter of administration with copy of the Will annexed.

The Issue :

6. The only contentious issue which needs to be decided by this Court is: Whether the present Chamber Summons of the applicant is maintainable when the suit itself has abated on the death of the sole executor?

Statutory Provisions :

7. For the purpose of deciding the aforesaid issue, the relevant provisions which need to be looked into are as follows:

8. Section 222 of the Indian Succession Act, 1925 relates to the probate which can be granted to an executor appointed under the Will and such appointment may be express or by necessary implication.

9. Section 226 of the Act pertains to accrual of representation in surviving executor of the Succession Act and when probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.

10. As per the provisions of Section 295 of the Act, in any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular

suit, according to the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in which the petitioner for probate or letters of Administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be defendant.

11. Rule 401 of the Bombay High Court (original sides) Rules regarding caveat speaks that;

> "...any person intending to oppose the grant of probate or letter of administration shall file a caveat in Form No.116 within fourteen days from the service of the citation upon him or within such shorter time as the Judge in Chamber may direct. Notice of the filing of the caveat shall be given by the Prothonotary and Senior Master to the petitioner or his Advocate on record. The Judge in Chambers may extend the time to file a caveat, provided the grant has not in the meantime been issued."

12. Rule 402 lays down, "an affidavit in support of a caveat shall be filed within eight days from the date of the filing of the caveat, notwithstanding the Court vacations."

13. Such affidavit needs to state the right and interest of the caveator, and the grounds of the

objections to the applications. A copy of the said affidavit is required to be served by the caveator on the petitioner or his Advocate on record. If such affidavit is not filed within the prescribed time, the caveat can not prevent the grant of probate or letters of administration. No such affidavit can be filed after the expiry of the said eight days without an order of the Judge in Chamber.

14. Procedure of affidavit in support of caveat being filed as per the provisions of Rule 403 reveals that;

> "(i) Upon the affidavit in support of the caveat being filed, the petition shall be numbered as a suit in which the petitioner shall be the plaintiff and the caveator shall be defendant. Notice of the fact that the petition has been renumbered as a suit shall be given by the Prothonotary and senior Master to the Petitioner or his Advocate on record. The notice shall be in form No.117. The petition shall be treated as the plaint and the affidavit in support of the caveat shall be treated as the written statement of the caveator. The procedure in such suit shall, as nearly as may be, be according to the procedure applicable to civil suits on the Original Side of the Court.
>
> (ii) Where there are two or more caveator and each of them has filed an affidavit in support of his caveat, separate suit numbers shall not be given to the petition, but all the caveators shall become party defendants in one

suit."

15. Having taken survey of the statutory provisions, let me now turn to the rival submissions.

Rival Submissions :

16. It is contended by the learned Advocate on behalf of the defendants that, the issue that on a death of a sole executor or all executors named in the Will, the probate proceedings filed by them abates, and the right to sue does not survive, and that there can be neither a substitution in the place of the deceased executor/executors nor conversion of the probate proceedings into one for grant for letter of administration has been settled by this Court as well as by various High Courts in India and is no more debatable. Reliance is placed on the recent judgment of the Division Bench of this Court in the case of **Thrity Sam Shroff v. Shiraz Byramji Anklesaria & another** reported in 2007 (2) Bom.C.R. 560.

17. It is also submitted on behalf of Defendant No.2 that the present application is not

maintainable on the ground that the right to sue does not survive on account of the death of the sole executor of the Will. It is submitted that this Court after considering various judgments of different High Courts has held that, in probate proceedings on death of last surviving executor, the right to sue does not survive and the proceedings are bound to abate.

Consideration :

18. The learned Division Bench of this Court in the case of **Thrity Sam Shroff v. Shriaz Byramji Anklesaria** (supra) has held (in para 8) that;

> "it is not in dispute that there is no specific provision in the said Act providing either for survival or abatement of the proceedings for grant of probate on the death of all the executors. However, it is the contention on behalf of the appellant that such proceeding being in the nature of suit in terms of Section 295 of the said Act, the provisions of Order XXII, Rule 4-A of Code of Civil Procedure are clearly attracted which contention is sought to be seriously disputed on behalf of the respondents. It cannot be disputed that in such circumstances the final order is in the form of grant of probate, and the same is passed 'in rem' and not 'in persona'. It is, therefore, sought to be contended that such proceedings would not abate on the death of the executors. However, referring to S. 226 of the Act,

> it is strenuously argued on behalf of the respondents that the very fact that a right to sue survives only in favour of the surviving executor or executors under the said section, the probate can be granted only in favour of the executors in terms of S. 222 of the said Act. It must be held that on the death of all executors, the proceedings for grant of probate would stand abated."

19. In the case of **Manekji Manchersha Javeri v. Phiroze Boman Javeri** reported in 1969 (72) BLR 21, one Phiroze had made an application for substitution of his name in place of the deceased Executor and while rejecting the application for substitution this Court held that;

> "the right of a person to obtain grant of Letters of Administration is quite different from the right of a person who derives title as Executor under a will to obtain a grant of Probate. The application for the grant of Letters of Administration would need certain averments, which would not be necessary in the case of an application for the grant of probate by person named in the Will as executor."

In the above words, the Court declined to make an order for substitution. The Court further held in the concluding para reading as under :

> "No doubt, when one of several executors or administrators dies, "all the powers of the office become vested in the

> survivors" as laid down in S. 312 of the Succession Act. That, however, is very different from saying that the right of an executor to apply for probate is a right to sue, or that when an executor dies pending application for probate a right to sue survives. First and foremost, it must be borne in mind that when a petition is filed on the testamentary side for the grant of representation, it is not a suit in any sense of the word; and secondly, if it remains non-contentious, it never assumes even the form of a suit. When a petition becomes contentious, what Rule 710 of this Court lays down is that, upon an affidavit in support of the caveat being filed, the proceedings are to be numbered as a suit and the procedure therein should, as nearly may be, be according to the provisions of the Code of Civil Procedure. Section 295 of the Succession Act enacts that the proceedings then take, as nearly as may be, "the form of a regular suit." That, however, does not actually make the proceedings a suit in the real sense of the term, and no question of the right to sue surviving on the death of the executor arises, even though the executor dies after the testamentary proceedings have become contentious."

20. The learned Single Judge of Calcutta High Court in the case of **Sarat Chandra Banerjee v. Nani Mohan Banerjee** reported in 1909 (III) I.C. 995 (Cal.) held in concluding para of his judgment as under:

> "...the right to sue in Order XXII means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time

> of his death, and that a right to obtain probate of a Will is a right different in its nature from a right to be appointed by the Court to administer the deceased's estate."

21. In the case of **Barumal Singh v. 3rd Additional District Judge, Saharanpur & others** reported in AIR 1986 ALL 303, the High Court agreed with the view taken by the Division Bench of the Calcutta High Court in the case of **Smt. Fatemanesha Begum v. Mahadin**, (1944) 48 Cal WN 673, and held in para 12 reading as under:

> "The only material question is whether a right to apply for a succession certificate can be said to survive to the heir of the applicant. There can only be a negative answer to this question. On the death of the applicant for a succession certificate the proceedings lapses, and it will be open to any other party entitled to a certificate to apply. There is no question of substitution in such cases."

And, finally, while dismissing the application moved by the Applicant, the Court in the concluding para said that;

> "even if under Order 22. Rule 3 of the Code of Civil Procedure applies, the right to sue does not survive."

22. The Patna High Court has in the case of **Deo Kumar Singh v. Kailash Singh** reported in AIR 1961 Patna 304 held that;

> "on the death of an applicant for a succession certificate the proceedings lapses as there can be no substitution of the heirs or the alleged heirs of the applicant, has got substance and must be accepted. No authority taking contrary view has been cited before me. I am in respectful agreement with the view expressed in the Bench decision of the Calcutta High Court." [Smt. Fatemanesha Begum vs. Mahadin (1944) 48 Cal WN 673].

23. The Gujrat High Court in the case of **Smt.Multivahuji w/o Goswami G. Girdharlalji v. Smt.Kalindivahuji & others** reported in AIR 1994 Gujrat 42 in para 19 held as under:

> "From the aforesaid observation it becomes clear that on contention being raised a probate proceeding is to be converted into a regular suit and it is to be tried as such. In the present case admittedly the contention is raised by the caveator and, therefore, such proceeding is to be regarded as a civil suit. It should be stated that such a proceeding is to be treated as civil suit and is to be decided as such under section 295 read with section 288 of the Succession Act. However, the limitations or restrictions under which the probate Court is acting shall remain and the Civil Court even while trying the proceeding as civil suit shall act within its limited jurisdiction. To same effect are the decisions of other High Courts and for the purposes of present

> controversy, I do not think it is necessary to extensively refer to such decisions."

24. The above cited case has also been considered and confirmed by the Division Bench of this Court in the case of **Thirty Sam Shroff** (supra).

25. During the course of the submissions, the learned Counsel for the applicant has relied upon the judgments taking contrary view. They are :-

(i) AIR 1933 Madras 114 (**Rama Naidu & others v. Rangayya Naidu**).

(ii) AIR 1963 Madras 456 (**Govind M. Asrani v. Jairam Asrani**).

26. The case of **Rama Naidu and others v. Rangayya Naidu** (supra) has been considered by the Division Bench of this Court in the case of **Thrity Sam Shroff** (supra). Vide paragraph 29 of the judgment, this Court has clearly expressed the view on the above authority cited on behalf of the applicant as under:

> "The scope and effect of Section 295 of the said Act does not appear to have been considered in the matter. With respect, we are unable to persuade ourselves to agree with the said view."

27. The decision in the case of **Govind M. Asrani v. Jairam Asrani** (supra) is solely based on the decision in **Rama Naidu & others** (supra) which is clear from paragraph 16 of this judgment. The relevant portion of the said paragraph is quoted hereunder:

> "We are of the opinion that even apart from any other consideration the question being one of procedure we should accept the decision in ILR 56 Madras 346 :(AIR 1933 Madras 114) on the principle of stare decisis. But even more than this, we are convinced that the binding nature of that decision rests on a sounder footing, namely, on principle. The appeal, therefore, fails and is dismissed with costs."

28. In view of the legal position settled by the learned Division Bench of this Court which is binding on me, I have no option but to dismiss the Chamber Summons with no order as to costs.

JUDGE